TARIMAN YUSOF

v.

MENTERI SUMBER MANUSIA, MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[ORIGINATING SUMMONS NO: R2-25-86-98]
29 APRIL 1999

LABOUR LAW: *Industrial dispute - Refusal of Minister to refer dispute to Industrial Court - Whether proper - Whether dispute involved questions of law and fact - Whether Minister could determine on legal issue - Failure to consider material fact - Whether Minister exercised discretion judicially*

This was an application by the applicant for an order of *certiorari* to quash the decision of the 1st respondent for refusing to refer the dispute in respect of the applicant's dismissal to the Industrial Court as well as for an order of *mandamus* directing the 1st respondent to refer the same to the Industrial Court for an award. The 1st respondent had earlier refused to refer the dispute to the Industrial Court on the basis that the applicant's dismissal was not fit for reference to the court concerned. The issues to be determined were (1) whether the conclusion by the 1st respondent that the basic salary of RM4,801 to the applicant by the 2nd respondent was a genuine mistake, and (2) whether the offer made by the 2nd respondent at a conciliation meeting which was rejected by the applicant was fair.

Held:

[1] The decision whether it was a mistake on the part of the 2nd respondent in awarding the basic salary of RM4,801 to the applicant was a question of law and fact. The issue of mistake was a legal issue and beyond the capability of the 1st respondent to decide.

[2] The 1st respondent considered that the offer made by the 2nd respondent at the conciliation meeting was more than fair on the basis that there was an increment in the basic salary awarded to the applicant. However, the 1st respondent failed to consider a material fact, *ie*, that the 2nd respondent's offer contained a condition that the salary in arrears would be deducted towards repayment of the applicant's loan with the 2nd respondent instead of by paying the monthly instalments as earlier agreed upon by the parties.

[3] In view of the above, the 1st respondent did not exercise his discretion judicially in refusing to refer the dispute to the Industrial Court.

[Application allowed with costs.]

Case(s) referred to:

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor [1997] 1 CLJ 665 ***(refd)***

Minister of Labour and Manpower & Anor v. Wix Corp SEA Sdn Bhd [1980] 2 MLJ 248 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(1), (2), (3)

For the applicant - A Murugavell (P Vickneswaren with him); M/s Murugavell Arumugam & Co

For the 1st respondent - Ahmad Kamal, SFC

Reported by Farah Naim

JUDGMENT

Azmel Maamor J:

The applicant in this case was employed by respondent No. 2 as an Assistant Section Manager (Production) with effect from 10 October 1991. From then onwards he had been receiving increments in salaries and job status. By a letter dated 5 April 1996 the respondent No. 2 confirmed the job status of the applicant as assistant manager in grade 1W-15(Q5) with a basic salary of RM4,801 wef 1st April 1996. However, the applicant was only paid a basic salary of RM4,401 per month from April 1996 and thereafter. As such the applicant made several protests and finally the shortfall of RM400 per month was paid as arrears in September 1996. Similarly the shortfall of same amount for the month of October 1996 and thereafter was paid as arrears together with the applicant's salary for March 1997.

By a letter dated 24 April 1997, the respondent No. 2 informed the applicant that his job status as assistant manager in grade 1W-15(Q5) was confirmed but with a reduced basic salary of RM4,590 an amount lesser than the previous basic salary of RM4,801.

Feeling that the respondent No. 2 had breached a fundamental terms of his contract of employment in the light of the reduction of his basic salary, the applicant wrote a letter dated 5 May 1997 to the respondent No. 2 stating that he considered himself having been dismissed by the respondent No. 2. Henceforth the applicant did not report for work. On 4 June 1997 the applicant made representations under s. 20(1) of the Industrial Relations Act 1967 to

the Director General of the Industrial Relations, requesting that he be reinstated to his former position with the basic salary of RM4,801. In consequence of the representations made by the applicant conciliation meetings were held to resolve the dispute. At the conclusion of the said meetings the respondent No. 2 offered to reinstate the applicant in the same department in the position of manager with basic salary of RM5,007.43 per month. However the respondent No. 2 imposed a condition, that the applicant's entire arrears of salary for the period from 6 May 1997 until the applicant resumed work in August 1997 be deducted towards repayment of a loan which had been taken by the applicant from the respondent No. 2 amounting to RM22,005.

The applicant disagreed with that condition. What the applicant wanted was that he be allowed to pay the loan by monthly instalments in accordance with what had earlier been agreed between respondent No. 2 and the applicant. Because the applicant did not agree to the condition imposed by respondent No. 2 the applicant requested the Director General of Industrial Relations to refer the dispute to the Industrial Court. In his response by a letter dated 5 August 1997 the Director General informed the applicant that the Honourable Minister (respondent No. 1) had made a decision that the applicant's dismissal was not fit for reference to the Industrial Court.

The reasons given by the respondent No. 1 for such decisions are as follows:

(1) Perayu telah menganggap perkhidmatan ditamatkan secara terancang kerana beliau tuntut majikan tidak wajar menurunkan gajinya daripada RM4,801.00 kepada RM4,590.00 sebulan.

(ii) Pemberian kenaikan gaji kepada Perayu berkuatkuasa 1.4.96 mengikut perkiraan sebenar ternyata satu kesilapan. Adalah wajar bagi majikan memperbetulkan kesilapan itu dan Perayu seharusnya akur dengan keputusan itu.

(iii) Majikan telah bersetuju untuk mengekalkan gaji Perayu pada tangga gaji yang telah diberi walaupun silap kerana terlebih bayaran.

(iv) Perayu enggan menerima cadangan penyelesaian walaupun cadangan tersebut nampaknya tidak mengakibatkan apa-apa kerugian kepadanya sedangkan pihak majikan telah menunjukkan sikap bertolak ansur dan bersedia menerima semula Perayu dengan menetapkan syarat yang mudah dan munasabah.

In the light of the refusal of the respondent No. 1 to refer the dispute to the Industrial Court the applicant made this application for an order of *certiorari* to quash the decision of respondent No. 1 and also for an order of *mandamus* directing the respondent No. 1 to refer the dispute in respect of the dismissal of the applicant by the respondent No. 2 to the Industrial Court for an award.

Before I begin to consider the merits of this case I feel it is pertinent to consider the role and function of the Minister in dealing with an industrial dispute. In order to do that I need to refer to s. 20(1), (2) and (3) of the Industrial Relations Act 1967. It reads as follows:

> 20. Representations on dismissals.
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> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
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> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrive at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
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> (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

As can be seen from the provision of s. 20(2) of the said Act upon representations are received from a workman the Director General of the Industrial Relations has to take the necessary steps to achieve a settlement. And if he is satisfied that there is no likelihood of a settlement his only recourse is to notify the Minister. As regard the scope of the function of the Director-General under s. 20(2) of the Industrial Relations Act 1967, I only need to quote the Federal Court decision in *Minister of Labour and Manpower & Anor v. Wix Corporation SEA Sdn Bhd* [1980] 2 MLJ 248 where at p. 250, Y.A. Syed Othman FJ said:

> Section 20(2) of the Act plainly does not impose any duty on the Director-General or his representative to decide or determine questions of any kind and to ascertain the law and the facts. He is merely required to deal with the situation in the way he thinks best to get the employer and the employee to settle the dispute. If he is satisfied that there is no likelihood of settlement within a month, he is to notify the Minister ... In notifying the Minister, section 20(2) of the Act does not appear to require him to do so in the form of a report on the circumstances leading to there being no settlement. He is merely to notify the Minister that there has been no likelihood of settlement.

On being notified by the Director-General that no settlement had been reached, it becomes the duty of the Minister under s. 20(3) of the said Act to exercise his discretion whether to refer such representations to the Industrial Court or not. That discretion has to be exercised judicially. The nature of discretion

the Minister has to exercise is very well described in the Court of Appeal case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor* [1996] 1 MLJ 481, where Y.A. Gopal Sri Ram JCA said; p. 513:

> Put simply, the first question which the Minister ought to ask himself is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at. However, as I have explained just a moment ago, this approach to the exercise of discretion is only a very general guide because a rigid adherence to it may result in **every** case being referred to the Industrial Court. That this is certainly not what Parliament intended is manifested by its conferment upon the Minister of a discretion whether to refer, or not to refer, a representation to the Industrial Court.
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> The second question that the Minister must ask himself is whether, objectively speaking, the representations made under s. 20(1) are frivolous or vexatious. If they are, then he may well be justified in refusing a reference. Whether they are or are not depends upon the facts of each case.

In the same judgment, His Lordship went on to say the role of a High Court in reviewing the decision of the Minister while exercising the discretion. His Lordship at p. 519 said:

> To summarize, when a question arises as to whether the Minister has correctly exercised his discretion under s. 20(3) of the Act, it is the solemn duty of a court to undertake a meticulous examination of the facts that were made available to the Minister. If the examination reveals that the representations made under s. 20(1) are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of *certiorari.*

It is on the basis of the above principles that I shall endeavour to consider the decision of respondent No. 1 in his refusal to refer the representations of the applicant to the Industrial Court for an award. As stated earlier the respondent No. 1 gave four (4) reasons why he decided not to refer the applicant's representations to the Industrial Court.

After having carefully examined the reasons given by respondent No. 1 in the light of the facts presented by the applicant and respondent No . 2, I concluded there are two (2) main issues that required full consideration. The first issue is in respect of the conclusion made by the respondent No. 1 that the award of basic salary of RM4,801 to the applicant by the respondent No. 2 in the letter dated 5 April 1996 was a genuine mistake made by respondent No. 2 and as such it was proper for the respondent No. 2 to rectify the mistake. In my view the decision whether it was a mistake on the part of respondent No. 2 in awarding the applicant a basic salary of RM4,801 is a question of law and fact. As to the factual aspect of it, proper consideration and implication must be given to the fact that respondent No. 2 had paid the applicant his

arrears of salary from the months of April 1996 to March 1997. Subsequent to that instead of sticking to the amount of RM4,401, claimed to be the proper basic salary of the applicant, respondent No. 2 gave the applicant a basic salary of RM4,590. Finally at one of the conciliation meetings at the Industrial Relations office the respondent No. 2 offered the applicant a basic salary of RM5,007.43. The various differing amounts do not appear in the affidavit of respondent No. 1 to indicate that all these relevant facts had been considered by the Minister. Even if he had, such decision is based on mixture of law and fact and in such a situation it would only be proper that such issue be properly determined by the Industrial Court. In the light of the above facts I am of the view that the issue of mistake becomes a legal issue and whether there was in fact consent on the part of the respondent No. 2 to give the applicant a basic salary of RM4,801 is a matter which should be properly considered by the Industrial Court. Hence it was beyond the capability of respondent No. 1 to decide on this legal issue.

The second issue is whether the offer made by respondent No. 2 at the conciliation meeting which was rejected by the applicant can be regarded as fair. Respondent No. 1 considered the offer to be more than fair since the basic salary offered to the applicant was RM5,007.43 per month, which is higher than RM4,801 which the applicant had insisted. But respondent No. 1 failed to consider that respondent No. 2's offer contained a condition in that his entire arrears of salaries which he would have enjoyed on being reinstated would be deducted towards repayment of his loan instead of by paying the monthly instalments which had been earlier agreed upon by both parties. Clearly respondent No. 1 in arriving at this conclusion had failed to consider a material fact. Had he considered all the facts before him I am sure the Minister would have come to the conclusion that the representations of the applicant were not frivolous or vexatious and as such they should have been referred to the Industrial Court for its consideration and award.

In the light of the circumstances as mentioned above I arrived at the conclusion that the respondent No. 1 had not exercised his discretion judicially in refusing to refer the applicant's representation to the Industrial Court. I therefore allowed this application with costs.

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